All Appropriate Inquiries Listening Session

March 17, 2010
Room 1153 - EPA East—1201 Constitution Ave. NW
9:30am-12:00pm

Welcome

David Lloyd, Director of EPA's Office of Brownfields and Land Revitalization, welcomed attendees to the All Appropriate Inquiries (AAI) Listening Session. Mr. Lloyd expressed that from EPA's perspective, the AAI rule is working as planned in meeting the goal of implementing the liability protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA is looking to hear from parties affected by the rule, which was implemented five years ago. At this time, EPA is soliciting informal comments on how implementation of the regulation is working. EPA will not respond to comments and recommendations at this time, but the Agency will consider them when determining whether future revisions to the rule are necessary.

Patricia Overmeyer, of EPA's Office of Brownfields and Land Revitalization, introduced herself and explained the format of the listening session. Ms. Overmeyer explained that those attendees who signed up to make comments in advance will speak first. Those who wish to comment but did not register in advance will speak afterward. The timeframe allotted for each speaker is three minutes. Afterwards, Ms. Overmeyer will answer questions about the rule. Attendees can make additional comments during this session, but EPA will not respond to comments on the rule at this time. EPA also will accept written comments via email. EPA may consider opening the rule up for a formal public comment period in the future, if the Agency finds that the comments and concerns expressed today indicate there is a need to do so.

Janet Pershing, ICF International, facilitated the session. She began by introducing the ground rules:

- Keep comments to three minutes or less so that everyone who wishes to speak may.
- State your name before speaking.
- Speak into the microphone.
- Keep mobile devices on silent mode.

Comment Session

Larry Schnapf (Law Offices of Larry Schnapf)

Ms. Pershing read a comment submitted by Larry Schnapf who was unable to attend the Listening Session:

"Only the first recommendation directly addresses AAI. The other two involve proposed programmatic changes to CERCLA that are intended to promote transparency and enable the public to better learn the risks posed by sites in their communities and participate earlier in the site investigation/cleanup and prioritization process.

1. **AAI** – require sampling of RECs that are identified as part of a Phase 1 and then require reporting to regulatory agencies. If there is a purchaser, they can qualify as a BFPP in exchange for the disclosure. If the deal falls thru, allow property owners who had no reason to know of the

contamination to report and qualify as an innocent landowner with just continuing obligation responsibilities.

2. **CERCLA Disclosure Obligations** (separate from AAI since this would apply to sites with no imminent transactions) – EPA issue guidance clarifying that section 103(c) applies to historical contamination without the current reportable quantity limitation. By informal guidance or policy, EPA can announce a one-year amnesty period for existing property owners to disclose contamination they have learned about without incurring penalties for non-disclosure. Sort of like the EPA audit policy for environmental violations.
3. **Use Section 128 State Response Program Authority** – EPA use this authority to require states to satisfy minimum requirements for their voluntary cleanup programs including uniform reporting requirements across the country in exchange for being eligible for the federal enforcement deferral. We have delegated programs under RCRA, CWA, and CAA that for the most part operate well. [There is] No reason that Brownfield programs [cannot] operate the same way to promote consistency across the country."

Lenny Siegel (Center for Public Environmental Oversight – CPEO)

Mr. Siegel expressed concern that many people who live and work near contaminated sites are unaware of the contamination. He noted that the key to protecting the public is notifying them, involving them, and disclosing results to them. However, early disclosure can lead to the failure of a deal. Mr. Siegel presented three conceptual approaches that would modify the AAI process without ruining transactions:

1. An incentive, rather than a requirement, would be a more effective way to encourage public notification. Some deals are not at risk of falling through, such as when the entity conducting the assessment is a school district. Notifying the public in such situations adds benefit, because neighbors may be able to provide additional information about the site's history. Although we are not in a position to require public involvement, we need to create a process so the public can easily become involved if they want to.
2. The public should be notified at the appropriate time so as not to cause problems with the transaction. Some, but not all, states require notification.
3. A repository should be established to provide public access to the information.

Barry Trilling (Wiggin and Dana, LLP)

Mr. Trilling introduced himself as a Brownfields lawyer from Stamford, CT, who reads many Phase I ESA reports prepared by various consultants. He noted that competitive pressures have driven down both the cost and quality of Phase I ESAs. In his area of work, consultants once charged $1,000 to $2,000 for an average Phase I ESA, or $2,500 to $3,000 for a more complicated one. Such a report would typically be very thorough. However, institutional purchasers have created a cottage industry in which Phase I ESAs are done for as little as $750. These often comply with the letter of the rule, but do not give a substantive analysis. For example, a thorough Phase I ESA might include the statement "we noticed that in a corner of the site, 55-gallon drums were leaking. We inquired about these drums to the site manager, who explained that they contained household detergent." A less-thorough report might only include information about the leaking 55-gallon drums at the site. Without additional information, the borrower or purchaser would not know whether these drums present a serious problem. A lack of thoroughness in a site assessment often results in failed deals over minor issues. A party that saves $1,000 in environmental consulting fees may spend an extra $10,000 in attorney fees because of it.

Mr. Trilling said the AAI rule does not explicitly state the qualifications an environmental professional should have to perform Phase I ESAs. Some states (such as Connecticut, Massachusetts, and New Jersey) have mechanisms in place for licensing environmental professionals. In other states, there are no licensing requirements, and inexperienced individuals can potentially perform ESAs.

Mr. Trilling addressed the issue of disclosing information on environmental contamination to communities. He explained that while more community disclosure is needed, it must be handled sensitively. There is a time and a place for mandatory disclosure. If contaminant levels do not exceed the regulatory standards, then their presence is not a concern to a community. If levels do exceed standards, reasonable steps to inform the community should be taken after the property sales transaction is complete. It is important not to cause a public issue that would halt the transaction. If a buyer walks away from the deal, then the site's cleanup will either be financed with public money, or it will remain contaminated.

Finally, EPA does not currently provide certifications that the AAI rule was followed. Certification would assure prospective purchasers that the assessment was properly completed.

Mary Hurley (Pineloch Management Corp.)

Ms. Hurley, a developer from Orlando, FL, explained that she relies on ESAs for her development projects. However, the way in which environmental consultants conduct Phase I ESAs adds cost and complication to the development process. She said that developers depend on having liability insurance for a span of years, but Phase I ESAs are only valid for six months. This interferes with redevelopment projects that would improve blighted properties. Ms. Hurley also mentioned that Phase I reports are not quantitative enough for use by developers.

Ms. Hurley also noted that the majority of developers are professionals whose careers depend on having a portfolio of quality projects that benefit the community. In the past, unscrupulous developers gave the industry an unfavorable reputation. However, they are uncommon now; such developers lacked the professional skills needed to withstand economic changes.

James Dismukes (Phase Engineering, Inc.)

Mr. Dismukes said that he believes the AAI rule is working very well from his perspective as someone who produces Phase I ESAs. He then introduced four points that he would like EPA to consider. First, some states do not release environmental data in a searchable format, making it difficult to meet the AAI rule's requirements that all relevant information be used when assessing sites. Second, any future requirement that a professional geologist or professional engineer be required to conduct ESAs at a site would be cost prohibitive and decrease opportunities for individuals to gain the field experience required to obtain their professional certifications. Third, the AAI rule is unclear as to whether additional investigations to prove a release occurred are needed. Finally, the definition of "adjoining properties" in the rule needs to be examined. Properties separated by a road are considered adjoining, even if it is a very wide freeway.

Andy Shivas (State of Tennessee)

Mr. Shivas is the Tennessee State Voluntary Cleanup Program and Brownfield Program coordinator. He said that from his perspective, the AAI rule has greatly enhanced the quality of ESA reports. In rural areas of Tennessee, some developers are very sophisticated, while others are non-professionals looking to acquire and develop a property. The AAI rule makes a complicated matter understandable even to an inexperienced developer. However, it is difficult for developers to meet the shelf-life requirements of the rule in the current economy.

Barry Hersh (New York University)

Mr. Hersh cited difficulties in making information accessible to communities. Environmental reviews related to contamination often are conducted separately from environmental reviews related to land use. Combining the information from these reviews would help with the flow of information to people involved in development projects, such as developers, U.S. Department of Housing and Urban Development (HUD), and others.

Question and Answer Session

Mr. Siegel asked whether EPA knows how many Phase I ESAs have been completed under AAI or its ASTM counterpart (ASTM E1527-05) since the rule went final. Ms. Overmeyer replied that that EPA has not tracked this number. A representative from Environmental Data Resources, Inc., indicated that although they do not know how many AAI compliant assessments have been done, they can check their records to see how many data reports have been ordered and how much these orders increased after the rule went into effect. This data should be used with caution, however, because such an increase may simply be the result of a favorable real estate market in a given year.

Mr. Siegel then asked whether anyone has compiled information on Phase I public disclosure requirements of various states. Ms. Overmeyer replied that although there is a report available that summarizes Phase I, or environmental assessment requirements across state programs, that report does not address disclosure requirements. This report only addresses whether or not states with voluntary cleanup programs use the AAI rule as the basis for their environmental assessment standards.

Jeff Furr, Booz Allen and Hamilton, asked whether there are statutory or judicial drivers to revisit the rule. Ms. Overmeyer replied that the statute does not mandate revisiting the rule after a specified period of time. She added that public opinion is the only driver.

Ms. Hurley asked what EPA's objective was in requiring an assessment of the price paid for a property versus the value of the property if not contaminated as part of the AAI requirements. Ms. Hurley stated that AAI reports are science-based assessments of contaminant levels and other quantitative parameters. However, calculating property value is an art and very subjective. She added that it is dangerous to mix the two. She noted that until the sale of a property is final, the property value may change. Ms. Overmeyer explained that the requirement to compare the price paid for a property versus the value of the property if it were not contaminated was carried over from the innocent landowner provision passed by Congress in the 1986 amendments to CERCLA. The requirement appears in the AAI rule, just as Congress provided it in the statute. The general idea behind the provision is that a court may consider whether or not a purchaser put thought into the appropriateness of the price paid for the property. If a property's price is not reflective of its general fair market value, the purchaser should suspect that there may be a problem with the property, such as potential environmental contamination.

Group Discussion

The purpose of the group discussion was to give all interested parties a chance to speak to each other, and let EPA listen to their thoughts. The goal was not to reach a consensus or answer questions.

Alerting the Public of Potential Hazards

Mr. Siegel described the case of a large housing complex in Brooklyn. Phase I and Phase II ESAs found that a former drycleaner was responsible for contaminating the ground water in a residential area, causing the transaction to fall through. This environmental concern was never reported to the thousands of residents who lived nearby, even though the contamination created the potential for vapor intrusion into nearby residences. This case is an example of the type of information that needs to be disclosed. If a property sale falls through as a result of a Phase I ESA, there is no quantitative data to disclose. However, if it is known from a Phase I ESA that there was a historic release, the surrounding community should be notified. Mr. Siegel questioned at what point is it okay to require disclosure.

Mr. Trilling state that he sees this example as one in which the public needs to be notified, but it must be determined when is the appropriate time to make that notification. Disclosure should be made to a local, state, or federal agency that can take action (Mr. Hersh suggested that the information go the local planning board). One way to ensure that the concern gets addressed is to give the purchaser of a property protection that ordinarily would not be available. Protection only should be given if the exceedances found are reported. This would be an incentive to keep the purchaser from backing out on the deal, and ensure that the issue will be addressed. Connecticut, Massachusetts, New Jersey, and other states require the reporting of migration of contamination to any public drinking supply. Other states are more lenient. Disclosure should not be required for every ESA where the findings indicate a release of a hazardous constituent at a level that exceeds health based action level, but the rules should be more stringent than they are currently.

Mr. Siegel stressed that the community engagement initiative is an abstraction of the goal to protect the public from actual hazards. Community involvement should not be done just for its own sake. Vapor intrusion from ground water contamination is a widespread problem not unique to cities such as New York and Philadelphia. ESAs are a way to get issues on the radar screen to reduce the exposure of chlorinated solvents in homes and schools.

Difficulties in Requiring Reporting

Mr. Dismukes expressed concern that property owners are often reluctant to allow environmental professionals to investigate their sites. Requiring disclosure may cause property owners to be even more reluctant. Property owners very rarely request a Phase I ESA because they want protection—they are often afraid of what the results may be. The purpose of a Phase I ESA is to identify an environmental condition. The conclusions of the ESA are the opinion of an environmental professional, not objective laboratory results.

Mr. Jerry Sanford of ASFE said that the purpose of AAI is to establish methods for assessment, not to set the rules for community notification or disclosure. This can be accomplished through other frameworks. Virginia's Ground Water Management Act requires action on any site that has ground water contamination from past mismanagement. The reporting obligation is on the owner and operator. However, the developer often owns the data. Therefore, the owner does not have the information they are required to report. Some consultants are not obligated to report because they are not licensed engineers or geologists.

Mr. Trilling described Connecticut's stringent reporting law that requires an environmental professional to tell the client to report an exceedance, or to report it themselves. These one-size-fits-all mandates from the government can create problems. Mr. Trilling added that private entities must work among themselves to address this issue. There are ways of doing this. For example, results from charrettes make for good brownfields projects.

Interviewing Neighbors

Mr. Trilling expressed his concern that records obtained via Freeedom of Information Act (FOIA) requests are rarely anything more than lip service. Mr. Hersh noted that FOIA requests are complicated and there is no searchable database to find Phase I ESAs. Often times, the neighbors know how long a property has been vacant and have observed midnight dumping. However, this type of information will not be found in an agency's records. The problem is when and how to gather this information. Some competitors and people of the NIMBY mentality will attempt to disrupt a deal if details about it become known before the transfer is final. During a Phase I ESA, the consultant should check records, newspapers, and local reports. However, consultants rarely do this. The engineering and consulting community should police themselves by driving those who are not helping the situation out of the market. After the deal closes, it is safe to ask neighbors for more information.

Mr. Siegel stated that he is concerned because EPA Legal staff indicate that information collected from neighboring property owners cannot be used as evidence, as it is not a major part of the AAI rule. The goal of a Phase I ESA is to answer questions, not simply check items off a list. Interviewing neighbors is an effective means of gathering information about certain aspects of a property. If a party conducting a Phase I ESA wants to ask the neighbors about a particular site, there should be a procedure by which they may do that. EPA is emphasizing community engagement across various programs, yet the communities are unaware of thousands of voluntary assessments that are conducted every year. By creating an opportunity—but not a requirement—to collect information from neighbors, we could notify, involve, and disclose information to the public when appropriate without destroying the deal.

Mr. Sanford said that he believes there is a good reason for not requiring interviews of neighboring property owners as part of the AAI rule: it would affect the transaction. In situations where a developer buys several properties to aggregate them together for a large development, the price of each property would rise if sellers knew about the final plan. At sites where this is not a concern, a good, qualified, competent consultant will involve as many people as her or she needs to develop the site history. There is no prohibition on involving neighbors. The problem is that some consultants are not qualified to properly conduct this work.

Qualifications of Environmental Professionals

The group discussed whether more stringent qualification requirements for environmental professionals would improve the ESA results. Mr. Siegel said this issue was raised in the past, and was met with concern, because there are many qualified professionals who have been doing this work for years who could lose their ability to do this work based on a need for license or certificate. Some years have passed, and now may be the time to act on this. Mr. Hersch said that the American Institute of Certified Planners recently announced their plans to create a category of Certified Environmental Planner.

Mr. Jeff Telego from the Environmental Bankers Association described a checks and balances system used by large financial institutions. Each banker has a list of consultants they determine to be qualified to do Phase I ESAs for their sites. Generally, the firms included on these lists are very familiar with the AAI rule and corresponding ASTM standard.

Mr. Trilling voiced his concern that the "cottage industry" consulting shops still find their way onto these lists. Bad Phase I ESAs may be conducted by bank-approved consultants. Mr. Telego said that in a large institution, the environmental services group may answer to a lot of different business lines; sometimes the environmental risk aspect is overlooked in favor of other concerns. The bankers have a good relationship with the appraisers, and are helping them become more environmentally-focused.

Ms. Hurley added that this system can lead to duplicate work. A property owner may order an AAI-compliant Phase I, but if the consultant is not on the bank's approved list, the bank may force the owner to pay for a second one. Even if the report is an appropriately sealed Phase I from a certified professional engineer with liability insurance, the bank still may not accept it.

Prices Charged by Consultants

Mr. Michael Murphy of Phillips Lytle, LLP raised the issue that the price of Phase I ESAs has been dragged down. It is not attractive work, and consultants aim to complete it quickly. Some firms send junior staff who do not have a lot of experience to conduct the site visit, and the senior staff simply signs off on it. This is an industry-wide problem that will not be changed by adding new standards.

Others noted that the price may not determine the quality of a Phase I. According to Mr. Dismukes, the site visit does not provide very much useful information regarding the documentation of actual contamination at a property. Almost all of the recognized environmental conditions are found through historical research purchased from a data provider. Areas of concern however can be hidden or the sources of contamination may no longer be present, and the site owner may not be a reliable source of information about on-going releases or environmental concerns.

Mr. Eric Axelrod of U.S. HUD said that he sees Phase Is as simple projects that do not require a PE or PG. The major problem is objectivity. A consultant may assume that certain facts are understood by the reader, and therefore not explicitly state all relevant facts in a final AAI report. It is important that all relevant facts be included in the report, and not simply implied. In response to a question about making the assessments public, Mr. Axelrod stated that HUD policy provides that Phase I reports are publicly available only in the case of certain approved projects.

Mr. Trilling agreed that a Phase I is not very technical. However, good judgment and experience are important. Environmental professionals must be able to recognize a data gap. Sometimes a consultant will fill a data gap with information provided by the owner, rather than filing a FOIA request and reviewing the records. It is usually the consultants who charge less money who skip these steps. Perhaps a minimum price can be established.

Closing Remarks

Patricia Overmeyer wrapped up the session by thanking attendees for coming, and reminding them that she will be accepting written comments via email.

Attendees
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Submitted Written Comments Regarding
All Appropriate Inquiries Listening Session

STATEMENT OF BARRY J. TRILLING FOR EPA "LISTENING SESSION,"
March 17, 2010

My name is Barry Trilling. I am a lawyer and partner in the Stamford Connecticut office of Wiggin and Dana, LLP, where I lead the firm's Climate Change and Sustainable Development group. I appreciate this opportunity to participate in EPA's "Listening Session" on the status of All Appropriate Inquiry and government programs that recognize and authorize private voluntary remediation of contaminated properties, including brownfields.

I have practiced environmental law for more than 30 years and my practice largely concerns the remediation, redevelopment, and reuse of contaminated properties. I am a member of the national corporate Board of Directors of the 16,000 member NAIOP, Commercial Real Estate Development Association, serve on Board of Directors' Sustainable Development Committee and as vice-chair of NAIOP's national Urban Redevelopment Forum. I formerly chaired the Environment and Infrastructure Subcommittee of NAIOP's national Public Affairs Committee, and also served as NAIOP's representative on the 25 member committee convened by EPA under the Federal Advisory Committee Act to negotiate and draft EPA's All Appropriate Inquiry Regulations, promulgated at 40 CFR Part 312. I have also served on the Executive Committee of the Connecticut Chapter of the National Brownfields Association and as a member of the Board of Directors of the Pennsylvania Environmental Council. Today, however, I speak only for myself as a lawyer who practices in the area of the remediation and redevelopment of contaminated properties, and not as the spokesperson of any of these organizations.

I was one of the original participants, along with my esteemed colleague Larry Schnapf, in the Brownfields Internet Forum listserve of the Center for Public Environment Oversight (CPEO) hosted by my friend Lenny Siegel, whom I met when we both served on EPA's All Appropriate Inquiry advisory committee. Larry, Lenny and I share a commitment to the remediation and responsible redevelopment of brownfield properties and the protection of the communities that live near those properties. We diverge, however, on how we can best meet that commitment. I would like to share with you today my perception of the current problems that the AAI regulations did not solve and how I suggest we might address them.

From my perspective as a brownfields lawyer who represents both owners and developers, inadequate and unsatisfactory Phase I Environmental Site Assessments (ESAs) continue to endanger transactions and put both site owners and interested bona fide prospective purchasers (BFPPs) at risk. I would like to see more stringent standards both for what constitutes an adequate Phase I ESA report and for the EPs who prepare them. In discussing the issue with fellow brownfields lawyers in Connecticut I noted a consensus that no improvement has emerged in the quality of Phase I reports since promulgation of the AAI regulation and the ASTM E1527-05 Standard that can be used to meet the regulation. Although the "quality consultants" on whom we could rely in the past to prepare reports continue to provide first-rate work, the number of both unqualified consultants and deficient reports appears, at best, to remain unchanged.

Many of the problems, for site owners and developers as well as for regulators and communities, arise from the absence of a uniformly high standard of performance from the environmental professionals who have prepared the assessments. The uncritical acceptance of these assessments has led to many, if not most, of the concerns expressed by both those who own and remediate properties and the communities in which those properties are located.

It appears that many institutional purchasers of Phase I ESAs have driven down the cost of those studies to the point that higher quality consultants can not afford to offer their services to these institutions. As a result, a cottage industry of Phase I providers has emerged that do no more than package documentary site reports and provide uncritical accounts of conversations and site visits without expert analysis. Some of these low-quality ESAs are now being sold for as little as $750. This phenomenon has received a thorough

treatment by Environmental Data Resources Senior Economist, Dianne Crocker. Her report can be found at: http://commonground.edrnet.com/posts/d347a7b39dI.

I would begin to correct this problem by amending the AAI regulation and the ASTM standard to require a Phase 1 report to contain more than a summary of the documents compiled, interviews conducted, sites visited, etc. To be of real value, a Phase I report should contain a narrative that links those documents, conversations, observations, etc. with an analysis as to whether or not the site under review contains a Recognized Environmental Condition (REC) or Area of Concern (AOC). Well written ESAs from quality consultants already do this. The regulation could accomplish this by requiring a section in each report that provides something to the effect of: "Document x, Observation y, or Conversation z disclosed [insert here a description of the condition or absence of any condition]; this does or does not suggest a REC or raises/does not raise a concern for following reasons: [insert here the narrative explanation]."

As noted in discussions on the CPEO list-serve, the topic of EP qualifications was perhaps the most contentious issue confronted during our 25 member Federal Advisory Committee Act deliberations on the AAI regulation. Representatives from the engineering and geology communities urged the adoption of a very stringent standard, but faced considerable resistance primarily from government agencies and lending institutions which argued that too stringent a rule would force them to displace current EPs and suffer the cost that hiring more qualified professionals would entail. The simple fact is that we need our EPs to meet some sort of minimal standards. Examples of the licensing of environmental professionals abound, including: state licensure or certification, such as for professional engineers in pertinent fields, geologists, Licensed Site Professionals (as in Massachusetts), Licensed Environmental Professionals (as in Connecticut), Licensed Site Remediation Professionals (as in New Jersey). These licensures could form the basis for an EP licensure, or by an examination prepared and administered by ASTM

In addition to licensure, the issue of the work actually completed by the EP is critical to the quality of a report. Although it was also a matter of some contention during the AAI Committee negotiations, I also suggest that the regulation be altered to require that an EP actually conduct site inspections, rather than the inspection being conducted under the supervision of the EP.

To accomplish any of these changes, let alone all of them, a provider would probably not be able to complete a compliant Phase I report for only $750 and unqualified EPs would likely be driven from the market.

Larry and Lenny have expressed concerns primarily from the perspective of communities in which voluntary brownfield cleanups have taken place. They have spoken of citizens' complaints of inadequate information about voluntary cleanups and their inability to protect themselves from contamination left in place that could result in an endangerment. Community interest representatives also appear to want a better understanding of how well voluntary cleanups provide long-term protection of public health and the environment.

Lenny and Larry would try to address these community concerns by changing the law to require:

a. public notification of the participation by applicants for BFPP status or otherwise in a state Voluntary Cleanup Program (VCP) activity;
b. public disclosure of suspected or known releases of levels of contamination that exceed public health standards;
c. public involvement and oversight of cleanup decision-making.

As a lawyer who represents owners and developers and as an individual conscience-bound and committed to making our cities more livable places by accomplishing brownfield remediation and redevelopment, I strongly advise that we do not step backwards by eliminating needed reforms that have facilitated private

voluntary efforts. These private voluntary efforts have productively and safely helped to create cleaner, productive properties that produce jobs and increase local tax bases. These reforms include recognizing the need for preserving confidentiality in the transactional process, allowing for risk-based cleanups, and encouraging the use of voluntarily supplied private resources rather than public funds to clean up contaminated sites. At the risk of mixing metaphors, let's not throw out the baby with the bathwater and be very cognizant of the law of unintended consequences.

The need for and timing of mandatory public disclosure and for public involvement should be carefully thought out. Most brownfield cleanups concern properties where contamination either does not exceed or only slightly exceeds state regulatory cleanup levels. At these sites, I question whether there is any need at all for mandatory disclosure and public involvement. (Further, public disclosure of minor adverse environmental conditions at a privately held property will arguably result in stigmatizing the site and reducing its value for real estate assessment purposes—a result that could injure already fragile municipal financial resources.)

Moreover, the need to compel disclosure or to invoke community involvement at sites where levels of contamination are and will remain confined to the property being remediated is outweighed by the disincentives such disclosure and involvement would provide to voluntary cleanup. When mandatory disclosure may be appropriate it should not be required before a real estate transaction is consummated except in cases of immediate threats to human health and the environment. Requiring earlier disclosure could prevent transactions from ever taking place with the result that the site contamination will either need to be addressed using public funds or not be addressed at all.

This bad outcome would arise for numerous reasons, from breaching the confidentiality needed to aggregate properties (so as not to be held hostage by sellers) to the exposure of sensitive financial information essential to the health of entities who are considering the purchase or sale of contaminated properties. Public, state, or federal involvement may be appropriate when there are substantial endangerments, releases to public water supplies, or realistic threats of vapor intrusion, but not in the vast majority of voluntary cleanups. Developers have a very realistic concern that premature disclosure could sink a brownfield transaction before it is ever launched or result in their loss of control over a site by unnecessary governmental intervention, interference from a self-interested NIMBY (i.e., "Not in my backyard" activist), and even obstruction from their competitors.

To address the legitimate concerns of communities without driving away innocent parties from voluntary cleanup efforts, here are some suggestions for further discussion:

a. If the results of any Phase II ESA completed after the closing of the transaction disclose the release or threatened release of a hazardous substance above state regulatory cleanup standards off-site, or to groundwater or surface water that flows beyond the limits of the property, the party seeking BFPP protection should report that condition to the state and local governmental regulatory authorities with jurisdiction over the issue.
b. If the parties to a contaminated property transaction cannot consummate the deal, and if the property owner had no reason to know of the contamination disclosed in the ESA, it might nonetheless qualify for the CERCLA innocent landowner defense with a continuing "reasonable steps" obligation (as per CERCLA Section 9601(35) (B) (II)). Neither the BFPP, nor the owner if it has innocent purchaser status should be required to "chase the plume" off site.
c. EPA could use its CERCLA Section 128 authority to defer its enforcement against sites that have completed state VCPs only to state programs that contain the duty to report as in item "c" above. See, *e.g.*, such programs in Connecticut, Massachusetts, Pennsylvania, New Hampshire, and Iowa. (This is also similar to a suggestion made by Larry Schnapf on the CPEO listserve.)

d. EPA should establish a voluntary BFPP program in which applicants may request BFPP determination letters from the Agency after a transaction has closed. The party seeking protection would a submit Site Characterization and "Reasonable Steps" completion report to EPA within two years after the closing and EPA would have 120 days to issue a letter acknowledging the applicant's BFPP status or request more information. If EPA does not respond within 120 days the applicant would be deemed to have BFPP status. Parties who do not apply for BFPP letters would still be eligible for BFPP status but, without the EPA imprimatur, would risk adverse court determination if later challenged. To track the effectiveness of this program, every party who seeks BFPP status would be required to submit a closure report to the Agency after the site has met its state remedial standards.

Thank you for the opportunity to make this statement, and for "listening." Please contact me if you have any questions.

WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
LINDA BERESFORD, OPPER & VARCO LLP

I am writing to submit my comments on EPA's All Appropriate Inquiries Standards. I am very familiar with this rule as I represent many clients who acquire brownfield properties. We generally recommend that acquiring parties follow this rule so that they may be designated as "bona fide prospective purchasers."

However, one part of the rule that I find extremely cumbersome and expensive is the rule that certain aspects of the inquiry must be conducted within 6 months prior to acquiring the property, and that full updates must be performed within one year prior to acquiring the property. I find that for many brownfield transactions, which can be complicated, that acquisition often cannot be completed within the 6 month period of time, or even a year if significant due diligence is being performed.

I also find that when the 6 month or one year updates are performed, very rarely is any new information discovered.

I urge EPA to consider changing this rule to allow acquisitions to occur within one year of all inquiries, and only require updates for certain information every year, and entire updates to be performed every two years. I think such a change would still yield sufficient information for prospective purchasers, but would save both money and time, allowing transactions for brownfields to proceed more smoothly.

Thank you for your consideration.

Sincerely,

Linda

Linda C. Beresford
Opper & Varco LLP
225 Broadway, Suite 1900
San Diego, CA 92101
(ph) 619-231-5858
(fax) 619-231-5853

WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
THOMAS DOYLE, PRESIDENT, ENVIRONMENTAL DISCOVERY, INC.

Dear Ms Overmeyer:

Thank you for the opportunity to voice my concerns regarding the current implementation of the AAI standards. I fear that the current business practices adopted by so-called “database vendors” and “Phase I clearinghouses” has led to a gross deterioration in the quality of Phase I ESA's and lender's real estate portfolios.

The business plan of a clearinghouse is simple: market environmental due-diligence services nationally to lenders, insurance companies, municipalities, etc., and once engaged, put the job up for bid to a local consultant. Of course, the low-bidder “wins” the project, with a typical deadline of one-week. If not completed by the deadline, the consultant is docked pay. If “changes” have to be made to the report, the consultant is docked pay. The consultant provides, or must pay, for insurance. While I recognize that this is capitalism at work, even a minimal quality level is unsustainable. This business model was prevalent in the appraisal industry, until questionable valuations led to tightening licensing, education and experience requirements-perhaps a consideration for Environmental Professionals.

The issue with database vendors is more draconian. The problem, quite simply, is that these vendors are selling reports directly to end-users, particularly banks and insurance companies, while encouraging the end-user to interpret the report findings. A simple analogy would ask, “Why have medical doctors?” Why not have the pharmaceutical companies encourage consumers to self-diagnose, and then sell the drugs directly to the end-user? Common sense wouldn't allow it-nor should common sense allow “the largest database vendor” to package incoherent data in a pretty package, come up with a slick marketing ploy, and confuse the end-user into thinking that a simple data dump replaces all other AAI criteria. Compounding this problem is the fact that this vendor has also created a network of favored consultants, so if the end-user is smart enough to ask for advice, the advice is coming from a limited few, not always the best. My solution? OSWER should utilize available, inexpensive GIS technology, allowing ANYONE free access to records formatted in an ASTM/AAI format. (EPA Envirofacts http://www.epa.gov/enviro/ is close.) Data “interpretation” would then be a valuable commodity, in line with the goal of establishing qualifications to be an EP. Data “accumulation” would not have any value, qualified individuals would compete fairly and overall collateral valuation would improve.

Thank you for your time.

Sincerely,

Thomas E.Doyle
President, Environmental Discovery, Inc.
Environmental Professional
edi1440@sbcglobal.net
630.761.9862

WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
F. STEPHEN MASEK, PRESIDENT, MASEK CONSULTING SERVICES, INC.

Dear Ms. Overmeyer:

I can not make it to DC on March 17, so appreciate this opportunity to help provide information on how AAI is working.

We are environmental consultants, and see two main weaknesses / problem areas with AAI:

1) Lender-Driven Phase Is: Most Phase I Environmental Site Assessments are done to satisfy lender requirements. The interests of lenders and buyers of property are different, yet the lenders almost always have a small group of "approved" consultants, and emphasize their desire to have those consultants understand and conform to the lender's risk tolerance/desires (something we heard over and over at the recent Environmental Bankers conference in San Diego). Many of the smaller and less sophisticated buyers do not have an understanding of AAI and CERCLA liability, so Phase I reports which satisfy a lender may not adequately address various issues from the point of view of the buyer and their potential liability. We suggest that lenders be prohibiting from maintaining lists of "approved" consultants, and that the buyer / owner who has the AAI/CERCLA liability be responsible for finding and selecting the consultant.

2) Low Level Field Staff: Many companies use their lowest-level "field staff" to perform the site inspections and most of the other work on Phase I Environmental Site Assessments, and there is usually no way to tell from reading their reports how much, if any, involvement an Environmental Professional had in preparing the report. Prices for Phase I Environmental Site Assessments have fallen to levels which only allow the very smallest companies to assign most of the critical tasks to an Environmental Professional. We suggest requiring that EPA require that the site visit be performed by an Environmental Professional, and that Phase I reports contain a list of all of the main tasks (site visit, aerial photo review, government database review, etc.), and indicate which person did each tasks, or the percentage of each task done by each person if more than one worked on the task.

Kindly contact me if have any questions or items to discuss, and I will be happy to help.

Sincerely,
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WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
STEPHEN D. PHILLIPS, PROVIDENCE

I would like to see the requirement for aerial photographs back to 1940 modified. It is sometimes difficult to find aerials for some locations back that early. I believe a better wording would to be require aerial photographs back to 1940 or the earliest date readily available.

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WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
TERRI SMITH, THE ELM GROUP, INC.

I was reviewing the Environmental Reporter summary of the listening session held last week and saw that the New Jersey licensed site remediation professional (LSRP) program was mentioned…while it is true that as part of the requirements, notification regarding any contamination found on property (at any time) must be reported to the DEP by an LSRP, what is happening in the market as a response to that requirement, are firms are creating "fire walls" within their Companies to provide PA's to individuals (such as owners and/or developers) who do not want to run the risk of the mandatory reporting requirements. They do not want to take the chance of being on the "hook" for completing cleanups that they are not responsible (developers and/or current property owners not RPs) and allowing them to have the ability to make those decisions on their own and not be forced to do so. In effect, this law has eliminated the voluntary cleanup program in NJ. It doesn't exist as of November 2009 (enactment of the Site Remediation Reform Act (SRRA)).

So far many (PRP's, banks, developers, etc) are waiting to see how this all plays out; thereby, slowing down opportunities to redevelop brownfields. Owners don't want to risk being told they may have contamination and having it identified to the DEP with mandatory time frames to cleanup and buyers do not want to accept the responsibility unless it makes sense. In addition, another comment somewhat related….as part of another law that was passed in NJ a few years ago it makes it mandatory to notify owners, tenants and individuals (businesses, schools, residences etc) within 200 ft of the property being remediated. This is done on a site through the use of a sign and/or letter. The sign and/or letter must describe what is happening and why (listing out the contamination). What this has done is two things…in some instances it has created a concern from those receiving the letters regarding their health and the potential for the cleanup to harm them…asthma and related illnesses; impacts on pregnant women ….not all sites are superfund sites. The level of inquiry that was received by the developer, owner and/or consultant listed as contact (DEP deferred being the contact – they just want copies of the letters and proof that they were sent and received and/or a photo of the sign) when these notifications happened was overwhelming. Many of these sites were being investigated so not much was known but it still initiated somewhat of a panic even though there was no direct impact (such as contamination contained on site)to many of those individuals. In urban areas due to the sheer number of sites under remediation (gas stations, commercial/industrial, etc) and the number of high-rise housing units some individuals were receiving more than one notice from more than one site adding to the confusion and concerns. In addition, it has impacted the real estate values of the surrounding area. I know personally of one homeowner that had her home on the market and lost 3 perspective buyers because of a notification sign that was erected on a nearby property. Due to the impact of the "potential" contamination/risk and the economy, she is unable sell her home and achieve her desire to retire to another location.

It should also be noted that there is an increased cost to the people to complete these activities. I know one example of over $1000 in just mailing costs for the notification alone.

I am not suggesting what is the right thing to do or not do….I just wanted to share what the impacts could be of these type of requirements to both sides of the equation and what might need to be considered.

Feel free to contact me with any questions.

Terri

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WRITTEN COMMENTS SUBMITTED VIA EMAIL BY
JEFF CIVINS, HAYNES AND BOONE, LLP

Hi, Patricia,

Here are my comments on AAI and the related CERCLA transactional defenses. To further elaborate, I have attached two articles—"The Third Party Defense and Transaction-Related Defenses of CERCLA: An Overview," and "Transactional Environmental Due Diligence: What Diligence is Due?" *[please contact Mr. Civins for copies of his published documents.]* Included in the first article is a chart I prepared that shows the relationship among the various Superfund defenses.

- With the new transaction-related defenses of the 2002 Brownfields Amendments, the innocent land owner defense is of virtually no value; in most, if not all cases going forward, the bona fide prospective purchaser defense (BFPP) should obviate the need for the innocent land owner defense because the BFPP defense, unlike the innocent owner defense, is not precluded by knowledge.

- The contiguous land owner defense, codified by the Brownfields Amendments, also is of virtually no value, because in most cases the third party defense will be available--contamination arising from an offsite source generally will be solely attributable to a third party with whom the land owner has no contractual relationship--and also because the contiguous landowner defense is precluded by knowledge.

- The third party defense generally has a lot more relevance than the agency--and some of the courts--have accorded it and is not precluded merely by the existence of a contractual relationship; the statute requires that the proscribed contractual relationship have some nexus to the act or omission giving rise to the contamination.

- None of the Superfund defenses compare to a prospective purchaser agreement (PPA) in encouraging parties to buy and develop Brownfields, because a PPA upfront specifies the onsite activities that the purchaser is required to perform and provides the purchaser protection from Superfund liability if it performs them, without the uncertainty of the purchaser having to wait for, and successfully assert an affirmative defense in, litigation.

- The Superfund defenses, even if you qualify and can carry the burden of proof, are of limited utility because they do not protect against liability under other federal or state statutes or the common law or as regards petroleum releases.

- The transaction-related defenses of Superfund provide no protection in mergers and acquisitions that do not involve the transfer of assets.

- All appropriate inquiry (AAI), although it has become the de facto standard for environmental due diligence, may go too far (e.g., requiring interviews that can be problematic where the transaction is intended to be confidential) or not far enough (as the ASTM standard recognizes, AAI does not cover a range of areas pertinent to prospective purchasers in their analysis of environmental risk, including, in particular, compliance).

- Even if satisfied, AAI is but one prerequisite to taking advantage of a transaction-related defense; the other requirements may be so costly as to make the defense of limited utility. For example, to qualify for the BFPP defense, as well as the other transaction-related defenses, a prospective purchaser also must stop ongoing releases, as well as satisfy other continuing obligations.

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WRITTEN COMMENTS SUBMITTED BY
CHAD HOWELL, ST. LOUIS DEVELOPMENT CORPORATION

MEMORANDUM
ST. LOUIS DEVELOPMENT CORPORATION

St. Louis Brownfields Program
A Gateway to Opportunities

TO:	**Patricia Overmeyer, USEPA Headquarters**
FROM:	**Chad Howell, Engineer Project Manager**
SUBJECT:	**Comments Related to the March 17, 2010 AAI Public Hearing Proposed Chouteau Park Project in St. Louis, Missouri**
DATE:	**March 30, 2010**

The purpose of this memorandum is to share an experience that the St. Louis Brownfields Program recently had that supports the contention that the six month "shelf life" for a Phase I Environmental Site Assessment prescribed by the AAI rule is too short for municipalities working to redevelop Brownfield sites. Susan Klein from Region 7 suggested that I provide the following brief summary:

SLDC is the economic development arm of the City of St. Louis, Missouri, and we have administrative responsibility for all of the city's development-related boards. We also manage the St. Louis Brownfields Program, which is currently involved with two assessment grants, five cleanup grants, a revolving loan fund supplemental grant, and revolving loan funds provided through the American Recovery and Reinvestment Act (ARRA), all provided by EPA.

In 2007, a local hospital assembled a number of derelict properties on behalf of the City of St. Louis, in an effort to "replace" a portion of a nearby park that it had leased from the city for employee parking. The assembled properties comprised slightly more than an entire city block and all structures were removed from the site. The city performed an AAI-compliant Phase I Environmental Site Assessment on January 28, 2008, but did not take title until December 31, 2008. The project partners never thought to update the Phase I, since they had spent that entire time period methodically characterizing environmental conditions on the site, enrolling it in the state's Brownfields Voluntary Cleanup Program, and designing cleanup strategies based upon the proposed park's public design process and discussions with the DNR. The city's next step was to apply for a $200,000 cleanup sub-grant through our ARRA Revolving Loan Fund grant. Imagine their surprise when the EPA not only declared them ineligible for cleanup funding, but also stated the City was liable under CERCLA, all because the deed was not recorded within six months of the Phase I ESA! Our view was this was certainly counter to the spirit of the law and the Brownfields movement, especially since environmental concerns were limited to the presence of lead in soil, a common urban phenomenon thought to be due to a number of non-point sources.

Those of us who have put significant time into this proposed park are starting to get a little frustrated. While I am confident that the project will get done without our help, I must now re-program these "Stimulus" funds, and there was never a more "shovel-ready" project. Some have suggested that we deed the park land to a non-profit corporation and have them apply for cleanup funds, but this course of action would require a vote of the people.

I understand the importance of limiting the use of old Phase I ESAs, but a cookie-cutter approach to rule implementation can have unintended consequences when dealing with complex real estate transactions. If you were considering potential changes to the AAI rule, I would suggest that you build flexibility into the section requiring an update within six months with an exception such as, *"unless the property was under the constant control of the prospective purchaser, who was actively engaged in environmental characterization and cleanup planning, documented through correspondence with the appropriate regulatory authority."* To require a new Phase I ESA under this scenario is redundant, time-consuming, and a questionable use of resources.

Thank you for taking the time to receive my input. I have also attached a string of emails (reverse chronology) between our organization and EPA Region 7, which provide a more detailed discussion of the issue. Feel free to call me at 314-259-3432 or contact me by email at howellc@stlouiscity.com if you would like to speak further about this.

C: Susan Klein, USEPA Region 7
Bob Richards, USEPA Region 7
Otis Williams, SLDC

EPA Eligibility E-mails

3/16/2010 5:41 PM
Mr. Richards, we're sorry you've reached the conclusion that you have on this project. This was all created by a simple administrative error; the city was careful to complete due diligence, enroll the site in the state's Brownfields/Voluntary Cleanup Program, and not take any actions that would exacerbate the problem. Their only error was that they didn't record the deed in time.

On or about November 23, 2009, you, Susan Klein and Chad Howell from my staff discussed this and a property transfer was suggested. We didn't realize such a transfer could not include the city; it's unfortunate that you've taken such a narrow view of the statute and deemed the city a liable party -- seems counter to the intent of the CERCLA amendments and the spirt of the Brownfields program. I'm sure the project partners will be extremely disappointed at this outcome.

Otis Williams

Otis Williams
Deputy Executive Director
St. Louis Development Corporation
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williamsot@stlouiscity.com

>>> <Richards.Robert@epamail.epa.gov> 3/16/2010 3:27 PM >>>

Chad,

It isn't a question of passive liability. It is a matter of who can qualify as a BFPP.

A requirement for BFPP status under CERCLA 101(40)(H)(i) is that the party is not potentially liable or affiliated with a party that is potentially liable.

The City was deemed a liable party during its first ownership because it did not have a timely, updated Phase I and could not qualify as a BFPP. Technically, the City is liable under CERCLA. As such it cannot qualify as a BFPP on its second ownership, because the City fails the BFPP requirement under CERCLA 101(40)(H)(i) to not be potentially liable [under CERCLA].

--BOB RICHARDS

03/12/2010 04:44
Subject: Re: Chouteau Park Eligibility Question

Chad,

I don't recall suggesting this procedure, or recommending it.

Nonetheless, I will look into it. It is a issue of passive liability and will be unique to each federal circuit.

--BOB RICHARDS

From: "Chad Howell"
<HowellC@stlouiscity.com>

To: Susan Klein/R7/USEPA/US@EPA,
Robert Richards/R7/USEPA/US@EPA
Date: 03/09/2010 10:24 AM
Re: Chouteau Park Eligibility Question

Hi Susan and Bob. You'll recall that eligibility for this project was denied due to the timing of the Phase I vs. the real estate closing date. As recommended, we have taken steps to transfer the property to the Land Reutilization Authority and immediately back to the city. The consultant has completed a new Phase I ESA, dated January 25, 2010. Please find attached the board resolutions that made the transfer and the subsequent sub-grant possible. Our real estate department is in the process of drawing up deeds for execution and recording. I'm assuming that this re-positions the project's eligibility and am inquiring
regarding what further documentation you will require before releasing the funding.

Thanks,
Chad

Chadwick Howell
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St. Louis Development Corporation
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>>> <Richards.Robert@epamail.epa.gov> 11/30/2009 3:21 PM >>>

Chad, Susan:

The acquisition date was December 31, 2008.
That sets timelines under AAI/ASTM E 1527-05, as follows:

The AAI/Phase I assessment must be dated between January 1 and December 31, 2008. (one year prior to use)

If the AAI/Phase I assessment is dated prior to July 4, 2008, (180 days or more prior to use) it must have an AAI/Phase I update conducted or updated after July 4, 2008 and prior to December 31, 2008.

The Phase I update must have the components under Section 4.6 of the ASTM standard:

1. interviews with owners, operators and occupants
2. searches for recorded environmental liens
3. reviews of federal, tribal, state and local government records
4. visual inspections of property and adjoining property
5. declaration by the environmental professional responsible for the assessment or update.

The timeline provided in the Jonathan Strobel letter of November 30, 2009, indicated the Phase I Assessment was dated January 25, 2008. The issue is whether there was a Phase I update with all the necessary components, and was the update timely.

These are the activities in the time line occurring after July 4, 2008 and prior to December 31, 2008:

. Environmental Remediation Cost Estimate Letter Report, Professional Environmental Engineers, Inc. for the City of St. Louis, November 7, 2008 (cost estimate is not one of the components in Section 4.6)

. Bonafide Prospective Purchaser-(The City of St. Louis) Submits Brownfield Voluntary Cleanup Program (MDNR B/VCP) Application for the Subject Property - Forest West Properties to the Missouri Department of Natural Resources, St. Louis Development Corporation, December 20, 2008 (application itself is not one of the components in Section 4.6) --Included submitting Environmental Records Reviews, Site Inspections, and Environmental Lien Searches for MDNR B/VCP eligibility determination, as well as an independent eligibility determination by the MDNR B/VCP. (actual dates of review, inspections and lien searches are not provided; assuming they are current, i.e., updated as of Dec. 20, 2008, they are components of Section 4.6. MDNR's eligibility determination is not determinative of AAI/ASTM compliance)

. MDNR B/VCP determines CERCLA Eligibility and accepts Subject Property into MDNR B/VCP, executes MDNR B/VCP Remediation Oversight Letter of Agreement, and City Pays $3,000 MDNR B/VCP oversight fee, December 28, 2008 (MDNR determination is not determinative of CERCLA status, and is only a conclusion and not in and of itself a fact supporting BFPP status)

. Chain of Title Report and Lien Search Review, of the subject property conducted by Bryan Cave LLP law firm for the City of St. Louis, December 10, 2008. ? Included environmental lien search within 180 prior to the subject property acquisition. (chain of title is one of the historical records search items under ASTM, and environmental liens were timely searched)

At most, given the above time line, the Section 4.6 components that might have timely been conducted and updated include (2.) searches for recorded environmental liens, (3.) reviews of federal, tribal, state and local government records, and (4.) visual inspections of property and adjoining property. That

leaves out (1.) interviews with owners, operators and occupants and (5.) declaration by the environmental
professional responsible for the assessment or update.

In summary, even given a generous consideration regarding timely reviews of government records and visual inspections, the Phase I update lacks interviews with owners, operators, and occupants, and the environmental professional's declaration.

The lack of the EP declaration for the update prior to acquisition is critical. While the various other Section 4.6 components might questionably have been updated, the updates came from various sources and there is no indication that prior to acquisition they were compiled and evaluated by an EP trained and qualified to identify recognized environmental conditions. The timely EP declaration for the update is a signed and dated statement and thus is an easily provable fact. It is missing. The EP statement dated November 30, 2009 from Mr. Strobel is too late to qualify as an update for an acquisition occurring last year.

Base on the information provided, my legal conclusion is that the property was acquired on December 31, 2008 without a Phase I assessment that had been updated in accordance with the AAI Rule or ASTM E-1527-05 Standard Practice.

--BOB RICHARDS

"Chad Howell" <HowellC@stlouiscity.com>
To: Susan Klein/R7/USEPA/US@EPA, 11/30/2009 12:40
Robert Richards/R7/USEPA/US@EPA

Subject: Chouteau Park Eligibility Question

Please find attached the Environmental Professional's response to your eligibility questions. I'd appreciate both of your review and comments.

Thanks,

Chadwick Howell
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DRAFT – FOR DISCUSSION PURPOSES ONLY

November 23, 2009

Mr. Chadwick Howell
St. Louis Development Corporation
1015 Locust Street, Suite 1200
St. Louis, Missouri 63101

Reference: All Appropriate Inquiry / ASTM E1527-05 Compliance Determination
4359-4399 Chouteau Avenue (Subject Property)
St. Louis, Missouri 63115

Dear Mr. Howell:

Professional Environmental Engineers, Inc., (PE) as the Environmental Professional of Record (pursuant to 40CFR.10) is pleased to submit this letter summarizing information that supports our professional opinion regarding the City of St. Louis and its recent purchase of the subject property with respect to:

1. The City of St. Louis by meeting the definition, and CERCLA liability protection afforded by, its status as a Bona Fide Prospective Purchaser (BFPP) pursuant to 42 U.S.C. 960(r); and as amended innocent landowner defense, 42 U.S.C. 9601(35)(B)(i)(II).
2. The City of St. Louis is provided CERCLA liability protection by CERCLA section 101(35)(B) All Appropriate Inquiries", by exceeding compliance with;
3. ASTM International Standard E1527–05 entitled "Standard Practice for the Phase I Environmental Site Assessment (ESA) Process" (ASTM E1527-05)
    a. Section 4.6 Continued Viability of Environmental Site Assessments
    b. Section 4.7 Prior Assessment Usage

The City of St. Louis meets the definition as defined by 42U.S.C. 9601(40)of the Bonafide Prospective Purchaser liability protection pursuant to 42 U.S.C. 9607(r) by a preponderance of the following evidence:

1. All disposal of hazardous substances at the subject property occurred before the City of St. Louis took ownership
    - There is no known hazardous waste disposal at the subject property, rather the contaminants of Concern discovered through three Phase II ESAs are anthropogenic source surface soil lead and arsenic contamination common to the vicinity);
2. The City made all appropriate inquiries into the previous ownership and uses of the subject property in accordance with generally accepted good commercial and customary standards and practices in accordance with ASTM E1527-05;
    - Conducted an Phase I ESA that exceeded ASTM E1527-05 within one year of the acquisition of the property
3. The City provided all legally required notices with respect to the discovery or release (consulted with and entered the site in the State of Missouri Brownfield / Voluntary Cleanup Program within 180 days of discovery)
4. The City exercised appropriate care with respect to hazardous substances found at the subject property by taking reasonable steps to (a) stop any continuing release, (b) prevent any future release and (c) prevent or limit human, environmental, or natural resource exposure to any

previously released hazardous substance by providing full cooperation, assistance and access to persons that are authorized to conduct response action or natural resource restoration at the subject property.

- The City conducted 2 Phase II ESA sampling events, enrolled the site into the State of Missouri DNR Brownfield / Voluntary Cleanup program, sent copies of all environmental assessment reports and laboratory data, and executed a Letter of Agreement including Letter of Agreement for MDNR site access and State oversight of site characterization and corrective action' as well as applied for financial assistance from the U. S. Environmental Protection Agency Brownfield Remediation Grants program.

5. The City is in compliance with any land use restrictions established or relied on in connection with any MDNR Brownfield VCP response action.
6. The City is not potentially liable or affiliated with any person that is potentially liable for response costs at the subject property through any direct or indirect familial relationship that is created by the instruments by which title to the subject property is conveyed or financed or by a contract for the sale of goods or services; or the result of a reorganization of a business entity that was potentially liable.
7. The City is in compliance with "continuing obligations" common elements "all appropriate inquiry" and "no-affiliation" with a liable party and the five continuing obligations.

The following timeline of the continuing environmental assessment and Brownfield corrective action planning activities at the subject property demonstrates that the site has met the intent and purpose of All Appropriate Inquiry and the ASTM E1527-05 by completing a Phase I ESA that exceeded the ASTM E1527-05 within one year of site acquisition, and has conducting ongoing Interviews, Environmental Records Reviews, Site Inspections, and Environmental Lien Searches within the required 180 days minimum of site acquisition.

Timeline of Continuing AAI / ASTM E1527-05 Activities
Conducted by the The City of St. Louis and the "Enviromental Professional"

- ***Phase I Environmental Site Assessment,*** *Forest West Properties(Subject Property), by* Professional Environmental Engineers, for the City of St. Louis, **January 25, 2008**
  - Conducted within 1 year of the subject property acquisition date of December 31st, 2008, by the City of St. Louis
  - exceeded the ASTM E1527-05
- ***Limited Phase II Screening Sampling,*** *Forest West Properties(Subject Property), by* Professional Environmental Engineers , Inc., for the City of St. Louis, **March 21 and 25, 2008**
  - Included continuing Interviews with previous owners and Site Inspection
- ***Limited Phase II Evaluation/Investigation and Subsurface Investigation,*** *Forest West Properties (Subject Property), by* Professional Environmental Engineers, for the City of St. Louis, **May 8, 2008**
  - Included continuing Interviews with previous owners and Site Inspection
- ***Remediation Evaluation Report,*** *Forest West Properties (Subject Property), by* Professional Environmental Engineers, for the City of St. Louis, **June 30, 2008**
- ***Environmental Remediation Cost Estimate Letter Report,*** Professional Environmental Engineers, for the City of St. Louis, **November 7, 2008**
- *Bonafide Prospective Purchaser-(The City of St. Louis) Submits* ***Brownfield Voluntary Cleanup Program (MDNR B/VCP) Application*** *for the Subject Property - Forest West Properties to the Missouri Department of Natural Resources, St. Louis Development Corporation,* **December 20, 2008**
  - Included submitting Environmental Records Reviews, Site Inspections, and Environmental Lien Searches for MDNR B/VCP eligibility determination, as well as independent eligibility determination by the MDNR B/VCP.

- ***MDNR B/VCP determines CERCLA Eligibility and accepts Subject Property into MDNR B/VCP and executes MDNR B/VCP Remediation Oversight Letter of Agreement and City Pays $3,000 MDNR B/VCP oversight fee December 28, 2008***
- ***Chain of Title Report and Lien Search Review,*** of the subject property conducted by Bryan Cave LLP law firm for the City of St. Louis, **December 10, 2008???**
    - Included environmental lien search within 180 prior to the subject property acquisition
- Bonafide Prospective Purchaser, represented by the Comptroller of the City of St. Louis acquires the subject property from Forest West Properties, Inc. by **Special Warranty Deed** dated **December 31, 2008** and certified / recorded by the City of St. Louis Recorder of Deeds, **January 15, 2009**
- ***OSHA Compliance Exposure Evaluation*** (for the City of St. Louis Grounds Keeping Activities), Professional Environmental Engineers, Inc., **June, 2009**
    - Demonstrates compliance with BFPP continuing obligation requirements
- ***City of St. Louis/SLDC USEPA Brownfield Grant Application Coordination Meeting,*** City of St. Louis Comptroller, Board of Public Service, Parks Department, Professional Environmental Engineers and the St. Louis Development Corporation meet to coordinate applying for the US Environmental Protection Agency Brownfield Remediation application for the subject property, **August 24, 2009**
    - Demonstrates compliance with BFPP continuing obligation requirements

- The City of St. Louis applies to the US EPA for Brownfield Remediation for financial assistance to clean up surface contamination for developing the subject property into a city park.

The list and timeline summary of Environmental Assessment Activities demonstrates that the City of St. Louis is protected by CERCLA liability as meeting the definition of a Bonafide Prospective Purchaser, The City of St. Louis, St. Louis Development Corporation, and Professional Environmental Engineers, the consulting Environmental Professional have
undertaken continuing assessment, including interviews, records review, site inspection, and lien searches that are within the minimum requirement of 180 days of acquisition pursuant to the ASTM E1527-05 Standard.

I further declare that , to the best of my professional knowledge and belief, I meet the definition of Environmental Professional as defined in 312.10 of 40 CFR 312; and I have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. I have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Pat 312.

PROFESSIONAL ENVIRONMENTAL ENGINEERS, INC.

Jonathan Strobel CHMM
Project Manager